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Supreme Court of the United States

UTILITY SOLID WASTE ACTIVITIES GROUP,
ENTERGY SERVICES, INC., MISSISSIPPI POWER COMPANY,
AMERICAN ELECTRIC POWER SERVICE CORPORATION,
AND GENERAL ELECTRIC COMPANY,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the second prong of the ripeness test set forth in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967) – hardship to the parties – must be satisfied even where the issue presented is purely legal, and Congress has prescribed an immediate, limited period for judicial review.

2. Whether the court of appeals erred when it declined to apply the "substantial evidence" standard of judicial review mandated by 15 U.S.C. § 2618(c)(1)(B)(i) to an agency rule because the court believed that the nature of the petitioner's challenge merited the imposition of a different, more deferential standard of review.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, the Petitioners state that the parties to the proceedings below were Central and South West Services, Inc.,[1] Entergy Services, Inc., Mississippi Power Company, the Utility Solid Waste Activities Group, General Electric Company, Sierra Club, and the United States Environmental Protection Agency.

Pursuant to Supreme Court Rule 29.6, Petitioner the Utility Solid Waste Activities Group states that it is an ad hoc consortium of approximately 100 electric utilities, the Edison Electric Institute, the National Rural Electric Cooperative Association and the American Public Power Association. The Utility Solid Waste Activities Group states that it has no stock in the hands of the public and no parent corporation. Petitioner Entergy Services, Inc. states that its corporate parent is Entergy Corporation, which owns all the common stock of Entergy Services, Inc. Petitioner Mississippi Power Company states that its corporate parent is Southern Company, which owns all the common stock of Mississippi Power Company. Petitioner American Electric Power Service Corporation states that its corporate parent is American Electric Power Company, Inc., which owns all of the common stock of American Electric Power Service Corporation. Petitioner General Electric Company states that it has no parent company and that no publicly held company owns ten percent or more of its stock.

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[1] On January 1, 2001, Central and South West Services, Inc. ceased to exist as a corporation and merged into American Electric Power Service Corporation. American Electric Power Service Corporation, as the successor in interest of Central and South West Services, Inc., is therefore named in this petition in lieu of Central and South West Services, Inc.

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JOINT PETITION FOR A WRIT OF CERTIORARI

Petitioners the Utility Solid Waste Activities Group, Entergy Services, Inc., Mississippi Power Company, American Electric Power Service Corporation (collectively "USWAG"), and the General Electric Company ("GE") respectfully jointly petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals was entered on August 15, 2000, revised on November 13, 2000, reported at 220 F.3d 683 (5th Cir. 2000), and is reprinted in the Appendix to this Petition ("Pet. App.") at 1a-35a.

JURISDICTION

The court of appeals entered its decision on August 15, 2000. The petitioners filed a Joint Petition for Rehearing En Banc, and USWAG filed a separate petition for panel rehearing, both of which were denied on November 2, 2000. Pet. App. 36a-37a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The first question presented raises no constitutional or statutory provisions. Instead, it involves the application of a prudential element of the ripeness doctrine announced in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

The second question presented concerns Section 19 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2618, which is reproduced in Pet. App. at 42a-46a. Sections 6(e) and 18 of TSCA, 15 U.S.C. §§ 2605(e) & 2617, are also relevant, and are reproduced in Pet. App. at 38a-42a.

STATEMENT OF THE CASE

The first important question raised by the decision below is whether the second prong of the prudential ripeness test first announced in *Abbott Laboratories* – hardship to the parties from delaying judicial review – must be mechanically applied in all cases. The courts of appeals are split on the question of whether hardship must be considered where, as here, the issue to be reviewed is purely legal, and where, as is also true here, Congress has, by specifying a limited time for judicial review of a regulation after promulgation, expressed its preference for the immediate resolution of disputed issues. This question has far-reaching implications, given the multiplicity of statutes (including many post-*Abbott Laboratories* public health and welfare enactments) that *mandate* that suits seeking judicial review of new administrative rules be brought within a brief period following their promulgation.

The second important question arises because TSCA requires that certain rules promulgated by the U.S. Environmental Protection Agency ("EPA") (including those challenged by the petitioners below) "*shall* be held unlawful" where "not supported by *substantial evidence* in the rulemaking record . . . taken as a whole." 15 U.S.C. § 2618(c)(1)(B)(i) ("TSCA § 19(c)(1)(B)(i)") (emphasis added). The question raised by the decision below is whether a court may override this congressionally-mandated standard of review provision where the reviewing court determines in its discretion that the standard is too demanding. Contrary to every other court that has applied this provision, the Fifth Circuit concluded that the nature of the challenge before it did not justify the heightened scrutiny afforded by the substantial evidence test. The court ignored the clear language of TSCA, and substituted the more deferential arbitrary and capricious test set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), in upholding the challenged rules.

1. Factual Background

The petitions for review below arose from EPA's promulgation of a final rule concerning the use and disposal of polychlorinated biphenyls ("PCBs"), 63 Fed. Reg. 35,384 (June 29, 1998), known as the PCB "Mega Rule." PCBs are a class of compounds originally prized both because they were good insulators and non-flammable. PCBs were manufactured and widely used in many industrial sectors from the 1930s through the 1970s. By 1978, however, Congress prohibited PCB manufacturing, and severely curtailed approved uses. See 15 U.S.C. § 2605(e) ("TSCA § 6(e)"). These statutory provisions, and the resulting regulatory program, have decreased human and environmental exposure to PCBs. Owing to their many historic applications, however, PCBs are still found in the environment and in industrial settings, including in equipment that still is being used for its original purpose (*e.g.*, electrical transformers).

The PCB Mega Rule was the culmination of a seven-year effort by EPA to reform its PCB program, which, over the prior 20 years, had become a tangled mass of restrictions, conditions, use authorizations, and cleanup and disposal requirements. In the Mega Rule, EPA attempted to add flexibility to, or streamline, its PCB decontamination, cleanup, and disposal procedures, and to clarify and codify other policies and practices that had developed over time but were not part of the regulations.

In the court of appeals,[2] petitioner USWAG challenged EPA's assertion in the Mega Rule that state and local PCB disposal regulations are not preempted by TSCA. EPA took this position both in the legally binding preamble to the Mega Rule, 63 Fed. Reg. at 35,386, and in its substantive text, 40 C.F.R. §§ 761.50(a)(6), 761.72(c)(2), & 761.79(a)(6). As required, USWAG's suit was filed "[n]ot later than 60 days after the date of the promulgation of" the Mega Rule. 15 U.S.C. § 2618(a)(1)(A) ("TSCA § 19(a)(1)(A)").

The basis for USWAG's claim of express federal preemption was 15 U.S.C. § 2617(a)(2)(B) ("TSCA § 18(a)(2)(B)"), which provides that, with limited exceptions, "no State or political subdivision of a State may, after the effective date of [*inter alia*, a TSCA § 6(e) PCB] requirement, establish or continue in effect, any requirement which is applicable to such substance or mixture." The Fifth Circuit had previously interpreted this TSCA provision. It held that a local ordinance banning the disposal of PCBs was expressly preempted by 15 U.S.C. § 2617 ("TSCA § 18"), reasoning that "Congress has *explicitly* mandated that [TSCA], and regulations promulgated under it by the EPA, preempt state and local

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[2] Jurisdiction over petitions to review PCB regulations is initially in the courts of appeals. *See* 15 U.S.C. § 2618(a)(1)(A) ("TSCA § 19(a)(1)(A)"). USWAG and GE filed separate petitions for review which were ultimately consolidated before the Fifth Circuit.

regulation of PCB disposal." *Rollins Envtl. Servs.* v. *Parish of St. James*, 775 F.2d 627, 634 (5th Cir. 1985).

In addition, both USWAG and petitioner GE challenged a variety of other provisions in the Mega Rule, including the scientific underpinnings for the PCB cleanup and decontamination provisions, the storage for reuse rule, certain provisions governing PCB transformers, and the authorization to use PCB-contaminated buildings and other surfaces. Central to each challenge was the assertion that EPA's action was unsupported by substantial evidence (indeed in some cases, any evidence) in the administrative record. TSCA § 19(c)(1)(B)(i) expressly provides that "in the case of a rule under [TSCA § 6(e)], . . . the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by substantial evidence in the rulemaking record . . . taken as a whole." 15 U.S.C. § 2618(c)(1)(B)(i). Both USWAG and GE noted that several courts had applied the substantial evidence standard to their review of PCB rules, including the Fifth Circuit previously in *Corrosion Proof Fittings* v. *EPA*, 947 F.2d 1201, 1214 (5th Cir. 1991), and the District of Columbia Circuit in *Environmental Defense Fund, Inc.* v. *EPA*, 636 F.2d 1267 (D.C. Cir. 1980). Besides being statutorily mandated, the parties observed that TSCA's substantial evidence test is more searching than the APA's arbitrary and capricious standard. See, *e.g.*, *Corrosion Proof Fittings*, 947 F.2d at 1213-14.

2. Decision of the Court of Appeals

The Fifth Circuit dismissed in substantial part GE's and USWAG's review petitions.[3] In doing so, it made two

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[3] EPA agreed to, and the Fifth Circuit therefore ordered, a remand of the cleanup and decontamination provisions of the Mega Rule (40 C.F.R. §§ 761.61(a) & 761.79(b)) in response to petitioners' arguments that EPA's estimate of the toxicity of PCBs was not supported by substantial evidence in the record. Pet. App. 22a, 35a. On remand, EPA is reviewing

remarkable holdings: First, it ruled that USWAG's preemption claim was not ripe for review, even though it involved a pure question of law, and was filed during the statutorily-prescribed period for judicial review; second, it ruled that TSCA's "substantial evidence on the record" standard for review of the regulation should be discarded in favor of the more deferential arbitrary and capricious standard.

1. On ripeness, the Fifth Circuit panel observed that *Abbott Laboratories* was the source of the ripeness requirement in proceedings for judicial review of administrative action:

> The Supreme Court has explained that the essence of the ripeness doctrine is to: "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a two-fold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."

Pet. App. 10a-11a (citing *Abbott Labs.*, 387 U.S. at 148-49).

While agreeing that, where a challenge is purely legal, prudential concerns that typically lead courts to reject facial challenges to agency regulations become less important, the Fifth Circuit nonetheless concluded that "where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness." Pet App. 11a. In light of this requirement, the court held that USWAG's preemption challenge was unripe, claiming that USWAG did not identify the state or local regulations that it contended

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that estimate. The Fifth Circuit also remanded another section (40 C.F.R. § 761.35) since EPA had not adequately explained why it had not granted a variance requested by the electric utility industry. *Id.* at 16a, 35a.

TSCA should preempt, nor offer evidence that it would suffer hardship if the court deferred consideration of the issue.[4] The court thus concluded that "any hardship that USWAG could suffer is conjectural." *Id.* at 12a. The panel made no mention of TSCA's 60-day limitation on post-promulgation judicial review, nor of the District of Columbia Circuit's line of decisions holding that predominantly legal challenges brought within statutorily-mandated periods for judicial review need not meet the "hardship to the parties" test. See, *e.g.*, *Louisiana Envtl. Action Network* v. *EPA*, 172 F.3d 65 (D.C. Cir. 1999).

2. In laying out the standard for its review of the petitioners' remaining claims, the Fifth Circuit initially recognized that for TSCA § 6(e) rules (*i.e.*, PCB rules) "'the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by *substantial evidence* in the rulemaking record . . . taken as a whole.'" Pet. App. 5a (quoting TSCA § 19(c)(1)(B)(i)). It further recognized that "'Congress put the substantial evidence test in the statute because it wanted the courts to scrutinize [EPA's] actions more closely than an arbitrary and capricious standard would allow.'" *Id.* (alteration in original) (quoting *Corrosion Proof Fittings*, 947 F.2d at 1214).

Nevertheless, the Fifth Circuit found that when it considered TSCA § 19(c)(1)(B)(i) in "context," that section did not "require" application of the mandated substantial evidence standard to the petitioners' claims. Pet. App. 6a-7a. The "context" consisted primarily of the following two findings:

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[4] As explained in its petition for panel rehearing, USWAG in fact cited to PCB disposal regulations from five states that it contended TSCA should preempt. USWAG also explained how these more stringent state regulations would frustrate and hamper PCB cleanups by USWAG members across the country, and why immediate resolution of this issue was necessary to prevent harm to petitioners. *See* Pet. App. 61a-63a & n.11.

(1) that TSCA § 6(e) "establishes a categorical ban on most uses of PCBs except as authorized by EPA," *id.* at 6a-7a, which the court characterized as a "rebuttable presumption that all uses of PCBs present an unreasonable risk of injury to health and the environment," *id.* at 7a; and (2) that the petitioners' challenges to the Mega Rule were in essence claims that EPA failed "to act," or "to craft as large an exemption as petitioners would like." *Id.* From these conclusions, the court reasoned that the petitioners were not entitled to any greater standard than would apply to most informal rulemakings, *i.e.*, that the agency acted arbitrarily and capriciously, because "[t]o require a greater evidentiary showing by EPA would eviscerate the categorical ban of section 6(e) and would reverse the presumption against PCB use that the section imposes." *Id.*

After acknowledging but distinguishing the District of Columbia Circuit's straightforward application of TSCA § 19(c)(1)(B)(i) in an earlier challenge to EPA's § 6(e) PCB regulations, see *Environmental Defense Fund*, 636 F.2d at 1277-78, the Fifth Circuit concluded:

> Accordingly, we hold that the substantial evidence standard of review provided for under section 19(c)(1)(B)(i) applies only when a petitioner challenges EPA's decision to depart from the outright ban and permit the use or expand the use of PCBs. *When a petitioner challenges an EPA rule restricting or prohibiting the use of PCBs, courts must review EPA's action under the arbitrary and capricious standard of review.*

Pet. App. 8a. (emphasis added)

REASONS FOR GRANTING THE PETITION

This case presents an important, recurring issue of federal ripeness jurisprudence. The Court's original prudential ripeness paradigm, announced in a trilogy of cases including *Abbott Laboratories*, states that ripeness turns on "the fitness

of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 149. In reliance on this test, the Fifth Circuit dismissed USWAG's preemption challenge, even though the Mega Rule was final agency action, the issue was purely legal, and the suit was filed within the limited 60-day period for judicial review specified in TSCA, because there was no evidence that hardship would ensue from delaying review. This approach conflicts with that taken by the District of Columbia Circuit, which has held that no showing of hardship is necessary when a challenge to final agency action presents predominantly legal issues, and the suit was filed within a statutorily-limited period for review. See, *e.g.*, *Eagle-Picher Indus.* v. *EPA*, 759 F.2d 905, 915-19 (D.C. Cir. 1985).

The *Abbott Laboratories* Court neither considered nor predicted Congress's increasing practice of specifying limited, immediate periods for preimplementation judicial review of new rules or regulations. The evolution of Congress's approach to administrative law necessitates a shift in the proper treatment of ripeness. This Court should grant certiorari in order to resolve the split between the courts of appeals on this prominent, oft-repeating issue.

This case also presents a significant question of statutory construction. TSCA § 19(c)(1)(B)(i) provides that courts must invalidate regulations issued under certain provisions of TSCA if they are "not supported by substantial evidence in the rulemaking record . . . taken as a whole." 15 U.S.C. § 2618(c)(1)(B)(i). By this provision, Congress displaced the arbitrary and capricious standard of review ordinarily prescribed for agency rulemaking under the APA, 5 U.S.C. § 706(2)(A). Contrary to other courts of appeals that have applied the TSCA judicial review provision, the Fifth Circuit, without any basis in the statutory language, rejected the express language of that section. Instead, the court held that the substantial evidence standard was applicable only to petitions challenging a regulation departing from the TSCA

§ 6(e) ban on the use of PCBs, while the arbitrary and capricious standard was applicable to petitions challenging regulations that restrict or prohibit the use of PCBs.

The Fifth Circuit's conclusion is contrary to the plain language of the statute and the views of other courts of appeals that have considered TSCA § 19(c)(1)(B)(i) and similar judicial review provisions in other statutes. By conditioning the applicable standard of review upon the nature of the petitioner's claim, the decision also creates an unworkable framework for determining what standard of review to apply. This Court should grant certiorari in order to clarify the proper standard of review under TSCA § 19(c)(1)(B)(i) and similar provisions of other statutes.

I. A CONFLICT EXISTS AMONG THE COURTS OF APPEALS CONCERNING THE APPLICABILITY OF THE "HARDSHIP" PRONG OF THE *ABBOTT LABORATORIES* RIPENESS TEST WHERE THE ISSUE TO BE REVIEWED IS PURELY LEGAL AND THE TIME FOR REVIEW OF REGULATIONS IS LIMITED BY STATUTE.

A broad array of major federal statutes provide immediate but limited periods for preimplementation judicial review of new agency regulations. See, *e.g.*, the Federal Trade Commission Act, 15 U.S.C. § 57a(e)(1)(A); the Securities Exchange Act, 15 U.S.C. § 78y(b)(1); the Consumer Products Safety Act, 15 U.S.C. § 2060(a); the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6976(a)(1); the Clean Air Act ("CAA"), 42 U.S.C. § 7607(b)(1); the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9613(a); and TSCA; see also Pet. App. 47a-59a (quoting the above and other statutory provisions that provide limited judicial review periods for new rules). These include many hallmark health and welfare programs enacted since this Court decided *Abbott Laboratories*. Regulations promulgated

pursuant to these statutes occupy many volumes of the Code of Federal Regulations.

By specifying limited, up-front periods for review, Congress has expressed a strong preference for scrutinizing new rules prior to implementation so that unreasonable or unsupportable elements can be excised before the government and the regulated community devote resources to implementation and compliance. The relationship of such provisions to the "hardship" prong of the *Abbott Laboratories* ripeness test is an important, recurring issue, which, until the Fifth Circuit's decision below, had been resolved in favor of allowing challenges to proceed within those congressionally prescribed periods.

A. Recognizing the prudential nature of the "hardship" test, the District of Columbia Circuit has dispensed with it in many cases where the issues are predominantly legal, and the time for judicial review is circumscribed by statute. The issue first arose in *Eagle-Picher*, where the court was presented with a challenge to CERCLA regulations filed within the 90-day review period prescribed in 42 U.S.C. § 9613(a). See Pet. App. 59a. The court rejected EPA's ripeness defense to the petition, stating:

> It is abundantly clear from the plain language of [§ 9613(a)] that Congress intended to provide prompt, uniform "pre-enforcement" review of CERCLA regulations to a broad class of petitioners, in order to avoid needless delays in the implementation of an important national program. This provision constitutes compelling evidence that Congress has, in effect, decided that the interest of the EPA in effectuating CERCLA's purposes will generally be furthered by review during the statutory period and, by implication, hindered by postponing review. . . . In determining a regulation's ripeness for review, courts should accord heavy weight to this sort of strong congressional proclamation of an agency's interest in the timing of review of its regulations.

759 F.2d at 916 (footnote omitted). The District of Columbia Circuit accordingly concluded that "no purpose is served by proceeding to the second prong" of the *Abbott Laboratories* ripeness test. *Id.* at 918. Stated otherwise, Congress's directive that courts hear challenges to new rules immediately renders inapposite the *Abbott Laboratories* Court's prudential interest in "protect[ing] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way." 387 U.S. at 148.

The District of Columbia Circuit has followed this approach in petitions for review filed under several different statutory schemes, each of which provides a window for preimplementation judicial review. See *Louisiana Envtl. Action Network*, 172 F.3d at 69 (RCRA); *George E. Warren Corp.* v. *EPA*, 159 F.3d 616, 622 (D.C. Cir. 1998) (CAA); *Natural Res. Def. Council, Inc.* v. *EPA*, 22 F.3d 1125, 1133 (D.C. Cir. 1994) (CAA); *National Recycling Coalition, Inc.* v. *Reilly*, 884 F.2d 1431, 1434 (D.C. Cir. 1989) (RCRA). Indeed, the *National Recycling Coalition* court took the *Eagle-Picher* analysis one step further, holding that judicial review during the limited period set forth in RCRA was "not merely 'preferred,' it was statutorily required." 884 F.2d at 1434.

TSCA § 19(a)(1)(A)'s 60-day limitation on judicial review is, in substance, the same as the limitation provisions central to the District of Columbia Circuit's ripeness analysis in the above cases.[5] In each, Congress set forth immediate but

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[5] *Compare* TSCA § 19(a)(1)(A) ("Not later than 60 days after the date of the promulgation of a rule under [various sections of TSCA including § 6(e)], any person may file a petition for review of such rule" with the appropriate court of appeals), *with, e.g.*, 42 U.S.C. § 6976(a)(1) ("a petition for review of action of the Administrator in promulgating any regulation . . . shall be filed within ninety days from the date of such promulgation") (at issue in *Louisiana Envtl. Action Network*), *and id.* § 7607(b)(1) ("A petition for review of [various agency actions and

limited periods in which challenges to new regulations may be brought, and specified the court or courts in which such challenges must be filed. These periods are substantially similar to statutes of limitations, and have been held to be jurisdictional. See, *e.g.*, *Edison Elec. Inst.* v. *EPA*, 996 F.2d 326, 331-32 (D.C. Cir. 1993) (holding untimely a challenge to RCRA regulations not filed within 90 days of promulgation).

B. Neither *Abbott Laboratories* nor its companion cases on administrative ripeness, *Toilet Goods Association* v. *Gardner*, 387 U.S. 158 (1967) and *Gardner* v. *Toilet Goods Association*, 387 U.S. 167 (1967), involved regulations for which Congress had specified a period for preimplementation review.[6] Nevertheless, while the Court has not squarely addressed the ripeness issue presented here in any previous case, the Court has strongly suggested in two recent decisions that where Congress specifies a period for preimplementation judicial review, the hardship prong of the *Abbott Laboratories* test should not apply. First, in *Ohio Forestry Association, Inc.* v. *Sierra Club*, 523 U.S. 726 (1998), the Court held unripe a challenge to a U.S. Forest Service management plan for a national forest in Ohio. In conducting the ripeness

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regulations] . . . shall be filed within sixty days from the date notice of such promulgation. . . .") (at issue in *Natural Res. Def. Council*), *and id.* § 9613(a) ("Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations.") (at issue in *Eagle-Picher*) (the text of each provision is reproduced in Pet. App. 57a-59a).

[6] The Federal Food, Drug and Cosmetic Act, at issue in all three cases, does provide for the immediate review of some types of regulations. *See* Pet. App. 50a-51a. The Court rejected the argument that by specifically enumerating certain rules for preenforcement review, Congress intended to bar preenforcement review of others. *See Abbott Labs.*, 387 U.S. at 141-48. The Court, however, did not consider the significance of the immediate review provisions to its ripeness analysis.

analysis, the Court emphasized that "Congress has not provided for preimplementation judicial review of forest plans. . . . The Plan is consequently unlike agency rules that Congress has specifically instructed the courts to review 'preenforcement.'" *Id.* at 737. Notably, in support of this holding, the Court cited 15 U.S.C. § 2618 ("TSCA § 19") as an example of a congressional requirement for courts to hear preenforcement challenges. See *id.*

In a second case decided just last term, *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000), the Court made general reference to the doctrines of ripeness and exhaustion of administrative remedies in the course of its jurisdictional analysis of a suit challenging certain Medicare regulations. Specifically, it noted that the:

> [d]octrines of "ripeness" and "exhaustion" contain exceptions, however, which exceptions permit early review when, for example, the legal question is "fit" for resolution and delay means hardship, or when exhaustion would prove "futile." (*And sometimes Congress expressly authorizes pre-enforcement review, though not here. See, e.g., 15 U.S.C. § 2618(a)(1)(A) (Toxic Substances Control Act).*)

Id. at 13 (emphasis added) (citations omitted). Having used TSCA § 19 twice to distinguish potentially ripe from unripe actions, the Court should grant certiorari, and decide whether TSCA's limitation on judicial review in fact renders the traditional "hardship" test unnecessary and contrary to congressional intent.

C. Here, the preemption issue is predominantly, if not purely, legal in nature, see *Pacific Gas and Electric Co.* v. *State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 201 (1983) (finding preemption to be a predominantly legal issue fit for review), and the Mega Rule is undoubtedly final agency action under the APA. See 63 Fed. Reg. at 35,384 (noting that the Mega Rule is a "Final

rule").[7] These factors render the issue "fit" for review. *Abbott Labs.*, 387 U.S. at 149-51. Under the District of Columbia Circuit's formulation in *Eagle-Picher*, fitness for review, taken together with Congress's express preference for early review of TSCA regulations, leads to the conclusion that the TSCA § 18 preemption issue is fully ripe for consideration.

The Fifth Circuit, however, relied solely on the traditional ripeness analysis, including hardship to the parties, in ruling against USWAG. See Pet. App. 1a (citing *American Forest & Paper Ass'n* v. *EPA*, 137 F.3d 291 (5th Cir. 1998); *Chevron U.S.A., Inc.* v. *Traillour Oil Co.*, 987 F.2d 1138 (5th Cir. 1993); *New Orleans Pub. Serv., Inc.* v. *Council of City of New Orleans*, 833 F.2d 583 (5th Cir. 1987)). None of the cases cited by the court involved a limited judicial review period.

Furthermore, under the panel's approach, some petitioners may be denied facial review of new rules altogether in instances where their claims are deemed unripe during the limited review period, and then deemed time-barred later. Given that time limits on preimplementation judicial review are likely jurisdictional, see *Edison Elec. Inst.*, 996 F.2d at 331-32, a petitioner whose claim is held unripe during the specified review period, but who suffers what the Fifth Circuit finds is "hardship" later (due, for example, to pressure to comply with the new regime or face enforcement, a hardship recognized in *Abbott Laboratories*), would likely be foreclosed from reinstituting its suit at that time.[8] This is

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[7] The Fifth Circuit expressly acknowledged that EPA's legally binding preamble text regarding preemption was a final regulation for purposes of judicial review. Pet. App. 10a n.2 (citing *Chemical Waste Mgmt.* v. *EPA*, 869 F.2d 1526, 1533 (D.C. Cir. 1989)).

[8] The result is even more extreme where limited periods of preimplementation judicial review also have been held to preclude as-applied

particularly true here, where states and localities, emboldened by the Mega Rule's regulatory reversal of TSCA § 18's preemption provision, will increasingly require strict compliance with their PCB rules and regulations that are inconsistent with, and more stringent than, the federal PCB rules. Even if TSCA § 18 may be raised as a defense to an individual state or local prosecution of such rules and regulations, the regulated community will never be able to obtain declaratory relief invalidating EPA's regulatory misinterpretation of TSCA § 18 in the Mega Rule, because such a suit would likely be time-barred by TSCA § 19(a)(1)(A).[9]

The Court should grant certiorari to resolve the conflict in the courts of appeals concerning the proper scope of the ripeness test where Congress has established a limited period for the immediate judicial review of new agency pronouncements. In light of the statutes that provide for preimplementation review of new rules, and the multiplicity of regulations that are continually promulgated pursuant to these statutes, this issue is recurring, important, and deserving of resolution now.

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challenges during enforcement actions. *See, e.g.*, 33 U.S.C. § 1369(b)(2); 42 U.S.C. § 9613(a); *Natural Res. Def. Council, Inc.* v. *EPA*, 859 F.2d 156, 167 (D.C. Cir. 1988); *Eagle-Picher*, 759 F.2d at 916. In those cases a petitioner may be precluded from raising *either* facial or as-applied challenges to the rule at issue.

[9] As USWAG argued below, such a scenario would require resolution of the TSCA preemption issue on a state-by-state, case-by-case basis, which would impose tremendous burdens on petitioners, and needlessly tax judicial resources nationwide. Pet. App. 61a-63a.

II. THE FIFTH CIRCUIT ERRED WHEN, CONTRARY TO OTHER COURTS OF APPEALS, IT DECLINED TO APPLY TSCA'S EXPRESS SUBSTANTIAL EVIDENCE STANDARD OF REVIEW TO CHALLENGES TO EPA'S PCB MEGA RULE.

A. In TSCA and several other statutes that authorize agency rulemaking, Congress has expressly displaced the arbitrary and capricious standard of review ordinarily applicable under the APA (see 5 U.S.C. § 706(2)(A)) with the requirement that the agency justify its rules by substantial evidence. TSCA § 19(c)(1)(B)(i) provides that, for review of regulations issued under the authority granted by certain sections of the statute, including § 6(e), "the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by substantial evidence in the rulemaking record . . . taken as a whole." 15 U.S.C. § 2618(c)(1)(B)(i).

Despite the unequivocal language of this provision, the Fifth Circuit concluded that when a petitioner challenges an EPA decision *not* to permit PCB use under TSCA § 6(e), or challenges a use permitted under TSCA § 6(e) as too restrictive, the rule will be subject to the less exacting arbitrary and capricious standard of review. The court did so notwithstanding the absence of any language in TSCA §19(c)(1)(B)(i) providing for an arbitrary and capricious standard. The court of appeals' rejection of the unambiguous judicial review provision of TSCA § 19(c)(1)(B)(i), and its decision to nevertheless review some rules, in some circumstances, under an arbitrary and capricious standard, puts it at odds with the other courts of appeals that have considered this TSCA provision and similar provisions of other statutes.

1. The decision below is inconsistent with decisions of other courts of appeals applying the identical provision of TSCA. The District of Columbia Circuit held that the "more rigorous" substantial evidence standard "expressly set forth in" TSCA § 19(c)(1)(B)(i) applied to EPA regulations creating exceptions to the ban on PCB use under TSCA § 6(e).

Environmental Def. Fund, 636 F.2d at 1277-78 (reviewing EPA rules that, *inter alia*, permitted routine servicing of certain PCB-containing transformers and electromagnets). That court later amplified its understanding that Congress intended TSCA § 19(c)(1)(B)(i) to require a searching review of the agency's reasons and explanations for rules promulgated under § 6(e). See *Chemical Mfrs. Ass'n* v. *EPA*, 859 F.2d 977, 991-92 (D.C. Cir. 1988); see also *Ausimont U.S.A. Inc.* v. *EPA*, 838 F.2d 93, 95-96 (3d Cir. 1988) (applying the substantial evidence standard to review EPA fluoroalkene regulations issued under TSCA).

The distinction between the uniform substantial evidence standard of review mandated by Congress and the variable approach applied below is an important one. Several courts of appeals have noted that TSCA § 19(c)(1)(B)(i) imposes a more searching standard of review than would ordinarily be applied under the APA.[10] The legislative history of TSCA § 19(c)(1)(B)(i) makes clear that Congress intended that courts "focus on the rulemaking record to see if the Administrator's action is supported by that record," and for that reason declined to provide for the traditional "arbitrary and capricious" review. H.R. Conf. Rep. 94-1679, at 96 (1976). More generally, several courts of appeals have described the substantial evidence test as requiring closer, more rigorous, and more demanding scrutiny of an agency's regulation than the relatively deferential arbitrary and capricious test normally applied to rulemaking under the APA.[11] This Court has

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[10] *See Chemical Mfrs. Ass'n*, 859 F2d. at 991-92; *Ausimont U.S.A.*, 838 F.2d at 96; *Shell Chem. Co.* v. *EPA*, 826 F.2d 295, 297 (5th Cir. 1987); *Environmental Def. Fund*, 636 F.2d at 1277.

[11] *See Florida Mfd. Hous. Ass'n, Inc.* v. *Cisneros*, 53 F.3d 1565, 1573 (11th Cir. 1995); *Asbestos Info. Ass'n/N. Am.* v. *OSHA*, 727 F.2d 415, 421 (5th Cir. 1984) *AFL-CIO* v. *Marshall*, 617 F.2d 636, 649 (D.C. Cir. 1979), *aff'd in part, vacated in part sub nom. American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490 (1981); *Union Oil Co.* v. *Federal Power*

noted that Congress may provide for "considerably more generous judicial review" by requiring courts to apply a substantial evidence test based on a thorough consideration of an entire administrative record, rather than the less searching arbitrary and capricious test. *Abbott Labs.*, 387 U.S. at 143.

It is likely that the rules petitioners challenged would not have survived substantial evidence review under TSCA § 19(c)(1)(B)(i). The substantial evidence standard requires a court to ask "whether a 'reasonable mind might accept' a particular evidentiary record as 'adequate to support a conclusion.'" *Dickinson* v. *Zurko*, 527 U.S. 150, 162 (1999) (quoting *Consolidated Edison Co.* v. *National Labor Relations Bd.*, 305 U.S. 197, 229 (1938)). The evidence in the record must be "more than a mere scintilla." *Consolidated Edison v. National Labor Relations Bd.*, 305 U.S. 197, 229 (1938); see *Chemical Mfrs. Ass'n*, 859 F.2d at 992; *Environmental Def. Fund*, 636 F.2d at 1277-78 & n.27. The court below upheld several Mega Rule provisions despite a complete lack of record evidence supporting them. For example, the court let stand a rule that reclassified painted metal surfaces as "porous," and required complete removal of PCB-contaminated paint, because "there is no evidence in the record that suggests that paint is not porous to spills of liquid PCBs and EPA provides a sensible explanation for the rule change." Pet. App. 24a. Instead of requiring EPA to produce substantial record evidence to support the regulations on painted surfaces, the court effectively required petitioners to produce substantial evidence that EPA erred. Similarly, the court let

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Comm'n, 542 F.2d 1036, 1041 (9th Cir. 1976); *but see Association of Data Processing Serv. Orgs.* v. *Board of Governors*, 745 F.2d 677, 681-86 (D.C. Cir. 1984) (Scalia, J.) (holding the quantum of factual support required under both standards, as they are stated in the APA, to be the same, although recognizing that Congress may have intended for a more scrutinizing standard where it expressly replaces the APA's arbitrary and capricious standard in a particular statute with the substantial evidence standard).

stand a rule creating a regulatory presumption that small transformers must be regulated as PCB Transformers, not because the rule was supported by substantial evidence, but rather because there was no evidence in the record "that could support the conclusion that the . . . small transformers . . . should not be classified as PCB Transformers." Pet. App. 19a-20a. With no affirmative evidence supporting them, these rules could not survive substantial evidence review.

2. In addition to TSCA, Congress has enacted a number of statutes with provisions specifying a substantial evidence test for review of agency rulemakings.[12] With the solitary exception of the decision below, courts have uniformly abided by the statutory language and applied the substantial evidence test. For example, this Court in *American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490, 522-23 (1981), recognized that the substantial evidence standard applied to review of an agency's regulation based on the plain language of the Occupational Safety and Health Act of 1970 ("OSHA"). See also *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 653 (1980) (reviewing OSHA regulation under substantial evidence standard). The courts of appeals, including the Fifth Circuit on other occasions, have also followed the congressional mandate, and reviewed rules under the substantial evidence standard where the statute so provides.[13]

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[12] *See, e.g.*, 15 U.S.C. § 57a(e)(3)(A) (Federal Trade Commission Improvement Act of 1974); 15 U.S.C. § 1193(e)(3) (Flammable Fabrics Act); 15 U.S.C. § 2060(c) (Consumer Product Safety Act); 29 U.S.C. § 655(f) (Occupational Safety and Health Act of 1970).

[13] *See, e.g., Pennsylvania Funeral Dirs. Ass'n* v. *FTC*, 41 F.3d 81, 85 (3d Cir. 1994) (Federal Trade Commission Improvement Act); *Forging Indus. Ass'n* v. *Secretary of Labor*, 773 F.2d 1436, 1444 (4th Cir. 1985) (OSHA); *Katherine Gibbs Sch. (Inc.)* v. *FTC*, 612 F.2d 658, 663-64 (2d Cir. 1979) (Federal Trade Commission Improvement Act); *D.D. Bean & Sons Co.* v. *Consumer Product Safety Comm'n*, 574 F.2d 643, 648 (1st

3. The Fifth Circuit erred in deviating from the plain language of TSCA § 19(c)(1)(B)(i). This Court has repeatedly emphasized "that courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). Interpretation of a statute begins and ends with the statute's language if that language is clear and unambiguous. See *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 432 (1999); *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997). TSCA § 19(c)(1)(B)(i) is unambiguous in mandating the form of judicial review: "the court *shall* hold unlawful [*inter alia*, a TSCA § 6(e) rule] if the court finds that the rule is not supported by substantial evidence in the rulemaking record . . . taken as a whole." 15 U.S.C. § 2618(c)(1)(B)(i) (emphasis added). This provision leaves no room to conclude that two standards of review are applicable to rules promulgated under TSCA § 6(e).

Nor does the legislative history of TSCA suggest any intention on the part of Congress to create a bifurcated standard of review based on the nature of the petitioner's claim. Both the Senate and House versions of the bill called for review of certain rules issued under TSCA pursuant to the substantial evidence standard. See H.R. Conf. Rep. No. 94-1679, at 95. The conference committee report makes clear that the conferees expressly adopted the substantial evidence standard to ensure that a reviewing court focus on the evidence in the rulemaking record. See *id.* at 96. The committee rejected more restrictive language in the original House bill that would have required substantial evidence to support only the "determination or findings required to be made" by the Administrator. See H.R. Rep. No. 94-1341, at 55 (1976). Had Congress intended different standards of review to apply

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Cir. 1978) (Consumer Product Safety Act); *Aqua Slide 'N' Dive Corp.* v. *Consumer Product Safety Comm'n*, 569 F.2d 831, 837 (5th Cir. 1978) (same).

depending on the nature of the challenge, it would have so provided, particularly since TSCA itself includes some provisions authorizing rulemakings that are not subject to review under the substantial evidence test. See, *e.g.*, 15 U.S.C. § 2607(a), (c), (d).

B. The Fifth Circuit decision creates a strange and unworkable framework for judicial review of TSCA PCB rules. The decision below permits a petitioner challenging a rule as too permissive to invoke a more exacting standard of review than a party challenging the same rule as too restrictive. Under the Fifth Circuit's formulation, a court must attempt to characterize the nature of both the provision at issue and the challenge before the court can determine which standard of review to apply. Are the conditions themselves being proposed in order to tighten restrictions or loosen restrictions? Was the challenge brought because the rule was perceived as too lax or too stringent? Frequently, if not always, a rule challenge will defy easy categorization. Even where the rule and the challenge can be characterized, which standard applies when one party challenges a rule as too stringent, and another party claims that the rule is too lenient, a situation that is not uncommon in the context of environmental regulations?

In this case the challenged provisions authorized use of PCBs, and thus were "departures" from the statutory ban on using PCBs. Although the court of appeals held that such "departures" should be reviewed under the substantial evidence standard, it nonetheless applied the arbitrary and capricious standard of review. Thus, the court did not even follow its own novel approach when it declined to apply the statutory standard of review to the new use authorization. As the decision below itself demonstrates, the court's approach will sow needless confusion in the administrative and judicial review process.

C. This Court should grant certiorari to resolve this important and recurring issue of statutory interpretation. Highly

contentious rulemakings involving PCBs have been underway for more than two decades, and new rules are still under active consideration. See EPA, Reclassification of PCB and PCB-Contaminated Electrical Equipment (Jan. 16, 2001) (signed by EPA Administrator Browner on January 16, 2001 but not yet published in the Federal Register); 65 Fed. Reg. 18,018 (Apr. 6, 2000) (extending comment period for proposed rule authorized by section 6(e) of TSCA originally published in 59 Fed. Reg. 62,788 (Dec. 6, 1994)). Courts should apply a single, workable standard of review to TSCA regulatory challenges.

Moreover, the decision below creates an unsettling precedent for future review of other agency rulemakings for which Congress has expressly prescribed the standard of review. The Fifth Circuit's interpretation of the TSCA judicial review provision encourages other courts to attempt to divine an overriding purpose or intent of a statute, and to adjust the degree of review afforded an agency's rule according to that purpose, notwithstanding clear statutory language mandating a particular standard of review.

For all the reasons outlined above, the Court should grant the petition to answer these important and recurring questions and resolve existing inconsistencies among the courts of appeals.

CONCLUSION

For the reasons stated, the joint petition for a writ of certiorari should be granted.

Respectfully submitted,

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